



Criminal Law News

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R. v. Harrison - Another Nail in the Charter Coffin

This is the latest instalment of the blunting the Charter series that has been issuing from various levels of our court for the past several years. The Charter is supposed to protect individuals from state intrusions into their private lives. A Mason-Dixon line, or line in the sand or whatever other cliché you want to use, that sets the boundary between the state and individuals. The theory is that when the state steps over that line, generally speaking, there are supposed to be consequences, and a remedy for the individual whose rights have been infringed or denied can be expected. Lately, in defining where the boundary is, the courts have been expanding the territory of the state to the detriment of the individual. And if that's not enough, when the courts have found the state has stepped over the line, remedies for the individual are being granted less and less. Lately the Charter is becoming a vehicle only capable of protecting or expanding group rights, think gay marriage as a recent example, than it is a shield to protect individuals from state malfeasance.

This case was an appeal to the Court of Appeal by Mr. Harrison from his conviction by Justice Norman M. Karam of the Superior Court of Justice. The decision was released on

February 11, 2008 and, as of yet, is unreported. The facts of this case are relatively straightforward. Mr. Harrison and another person named Friesen, were driving a rented SUV from Vancouver to Toronto. As they were traveling near Kirkland Lake in Northern Ontario, with Mr Harrison doing the driving, they came to the attention of O.P.P. Officer Bertoncello. Officer Bertoncello testified that when he first noticed the SUV it was driving at the speed limit and leading a line of eight or nine vehicles. What drew the ire of the good officer, was that the SUV was daring to drive in Ontario without a front licence plate. He activated his roof lights and maneuvered his cruiser behind the SUV, when he noticed something that left him with a conundrum. What he noticed was that the SUV had an Alberta licence plate on its rear. It was the decision made by the good officer at that moment that led to all that happened in this case since, which includes me writing this article, you reading it and this case ultimately making its way to the Supreme Court.

You see, the problem is this: in Alberta, vehicles are not required to have a front licence plate. Officer Bertoncello knew this. He also knew at that moment that he no longer had a lawful reason for stopping the SUV. The Charter seems to tell us that since they were not speeding and since they were not obviously violat-

ing any other provision of the *Highway Traffic Act* or the *Criminal Code*, Officer Bertoncello should have left them alone. He didn't, and here we are.

Officer Bertoncello's rationale for continuing with the traffic stop in the face of the complete absence of grounds to do so are quite telling. His response to the trial judge's question to him as to why he continued with the stop was:

A. Ah, continuation of the, ah, the traffic stop. I had my emergency lights already going, um, the, ah, the vehicles behind me. I had been pulling over. Um, my integrity was, ah, was there, the integrity for police, and also now to check up on, to make sure that this person is eligible to drive in the Province of Ontario.

Ah, the old "integrity of the police" routine. Can you imagine the chaos that would have ensued had Officer Bertoncello just shut off his roof lights? I'm sure all those vehicles behind him would have no doubt presumed the rule of law had suddenly been repealed.

After stopping the SUV, Officer Bertoncello asked Mr. Harrison for his licence, the vehicle registration, the rental agreement and insurance papers. He produced everything except his licence. He couldn't produce his licence because he didn't have one. It had been suspended a few weeks before. As Mr. Harrison pretended to search the SUV for his licence, Officer Bertoncello looked in the SUV and noticed clothes in the back seat, fast food containers littered throughout and some sealed boxes in the back. Eventually, Officer

Bertoncello ran Mr. Harrison on CPIC and found out he was a suspended driver. At this point he arrested Harrison and decided to search the SUV as an incident to that arrest. When questioned at trial why he needed to search the SUV when arresting a person for driving suspended, he stated it was to search for Harrison's licence and for "officer safety." During his search, where do you think Officer Bertoncello goes first? Do you think he went and checked the clothing in the back seat, which would be a reasonable place one would think to look for a driver's licence? No he pretty much went straight for the boxes in the back which he opened and found cocaine inside. When the dust settled, 77 pounds in cocaine were found. That's a lot of blow.

At trial, the judge found that Constable Bertoncello violated Mr. Harrison's rights under both s. 8 and s. 9 of the Charter. He found that Officer Bertoncello's testimony on the voir dire held to examine his reasons for stopping the SUV was "contrived and def[ie]d credibility." The judge also found that the search of the SUV after Mr. Harrison's arrest was not "truly incidental" to the arrest and that "the officer's avowed purpose for the search was certainly not reasonable."

The judge went on to hold that Officer Bertoncello's actions were "brazen and flagrant," the search was not conducted in good faith and that the Charter violations were "extremely serious." Notwithstanding these strong findings and inspire of finding that the officer's testimony was "contrived and def[ie]d credibility," which seems to be judge-speak for full of lies, he refused to exclude the cocaine from the trial because basically, 77 pounds of cocaine is really a lot, and

to exclude it would bring the administration of justice into more disrepute than its inclusion.

The majority of the Court of Appeal agreed with the trial judge. They found that the effects of the breaches themselves were not particularly serious, Mr. Harrison was not subject to any physical restraint and it was a vehicle search. It's not as if they searched his house. Besides, 77 pounds is really a lot of cocaine.

It's this last fact that the trial judge and the majority at the Court of Appeal can't seem to get past. It's going to take more than a non-physical vehicle search and a little police lying in court to get that much cocaine excluded. If you want a chance at getting that much cocaine excluded you either need to be beaten by the police, or at least have them unlawfully enter your home. On the facts here, if it were pot, or less cocaine, then maybe, but 77 pounds, no way. If you think I'm being over the top, this is what the Court of Appeal said at par.62:

[62] By way of illustration, had the police officer in this case engaged in more egregious conduct, such as entering the appellant's home without a warrant, or threatening or assaulting the appellant, that may well have tipped the balance in favour of exclusion. The same holds true in terms of the nature and quantity of the drugs seized – a small amount of marijuana may well have yielded a different result. In our view, this is precisely the dichotomy of result that s. 24(2) envisions and that Collins and its progeny permit.

Thankfully, not all members of the Court of Appeal were convinced. In a strongly-worded dissent Justice Eleanore Cronk sided with Mr. Harrison and as such wrote him a ticket to the Supreme Court. In her opinion, both the trial judge and the majority at the Court of Appeal were blinded by the amount of cocaine and focused on that aspect to the exclusion of other relevant factors, especially the misconduct of Officer Bertoncello both during the stop and later during his testimony at trial.

In her opinion, the routine admission of evidence in the face of breaches and police conduct as found here would have a much more long term detrimental effect on the administration of justice. Here's how she stated it at par. 150:

[150] The reliability of the evidence, the amount and type of the drug seized, and the seriousness of the alleged crime do not overwhelm the s. 24(2) analysis at the expense of the consideration of other factors that are relevant to the admissibility determination. Were it otherwise, whenever serious crime is alleged in circumstances where significant constitutional violations lead to the discovery of important, non-conscriptive real evidence, the evidence would be admitted under s. 24(2). This approach must be rejected. It would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the Charter and, in effect, declare that in the administration of the criminal law "the ends justify the means". That theory is

not the foundation of our constitutional order and system of criminal justice. It would be tantamount to treating s. 24(2) as a rule of virtually automatic evidentiary inclusion in the circumstances of serious crime involving non-conscriptive real evidence of a dangerous drug. The Supreme Court of Canada has clearly rejected this view of s. 24(2): see *Buhay* at para. 71; and *Mann* at para. 57.

As such, in her opinion, the cocaine ought to have been excluded from the trial, notwithstanding this would have lead to the acquittal of Mr. Harrison.

Apparently this case is being appealed to the Supreme Court. Obviously it will be up to them to

take sides and we'll see which side of the line they fall on. Given the current political climate and from some of their recent decisions, I wish I could be optimistic that they'll side with Justice Cronk. I was surprised some though. There was some negative reaction to this decision in the press. Not much but some, which may indicate the pendulum may have reached its furthest point and begun its descent back to centre. People should realize the Charter isn't a cloak for those intent on committing crime, but a shield that protects us all. ■

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